SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 573.

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE,
as Trustees of the United Mine Workers of America Welfare & Retirement Fund of 1950,
Petitioners,

vs.

F. ARNOLD LOWRY,
individually, and trading as Lowry Coal Company,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, F. Arnold Lowry, individually, and trading as Lowry Coal Company, in opposition to the petition for a writ of certiorari filed herein, respectfully represents:

QUESTION PRESENTED.

Where the district court, prior to trial, sustained plaintiffs' motion for summary judgment, finding that there was no issue to be resolved as to any material fact, and, upon appeal, the court of appeals reversed the case

and remanded it to the district court for trial, finding that there were factual issues to be determined, should certiorari be granted to the court of appeals prior to final judgment because the subject matter of the case pertains to collective bargaining contracts?

STATEMENT OF THE CASE.

The respondent, F. Arnold Lowry, resides at Pennington Gap, Virginia, and is engaged in the business of mining coal by the strip mining method (D. A. 9).* Prior to 1955, he had engaged in the coal business under a partnership arrangement known as the Smith & Lowry Coal Company (D. A. 30). On or about May 1, 1955, Lowry moved his stripping equipment upon a leasehold in Harlan County, Kentucky to commence strip mining operations at that point (D. A. 29). At that time, Lowry had only three employees, and only one of these was a member of the United Mine Workers of America; he and his men were in complete accord as to wages and working conditions and he was not operating under a union contract (D. A. 29).

While Lowry and his employees were moving his machinery upon the coal lease property, one Clarence Floyd, field representative for District 19, United Mine Workers of America, came to the mining site and demanded that Lowry sign a union contract (D. A. 29). There was no pretense by Floyd that he represented Lowry's employees, or that he knew these employees, or that he even knew how many employees were working for Lowry (D. A. 29). The contract offered by Floyd, and which was subsequently signed by Lowry, was a printed

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* To avoid confusion, the same system of abbreviation to references as used in the petition for certiorari has been used in brief for respondent.

form contract, which had been negotiated at Washington, D. C., between the United Mine Workers of America and the large coal operators and associations, and was known as the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952 (P. A. 7, 8).

Lowry explained to Floyd that by reason of the small size of his operation, he could neither pay the union scale of wages nor pay the welfare royalty called for by the contract (D. A. 29). Floyd told Lowry to sign the contract and that would take the union off of his (Floyd's) neck, and that Lowry could pay whatever welfare royalty he was able to pay, and that it would be understood between them that the written contract was not binding on either party and was not to become effective, but was executed as a mere sham (D. A. 30). The subsequent contracts, being the amendment of September 1, 1955, and the amendment of October 1, 1956, were entered into between Lowry and Floyd with the same mutual understanding and agreement (D. A. 30).

Lowry and his employees did not follow the union scale of wages, but continued to mutually agree upon both wages and working conditions as they had previously done prior to May 1, 1955 (D. A. 30, 31). Lowry did not deduct union dues from the wages of his employees, but paid these dues himself (D. A. 23, 24). Neither the contract signed on or about May 1, 1955, nor any of the subsequent contracts, were executed as an inducement to get Lowry's employees to work for him, and the terms of these contracts were never considered to be effective as between Lowry and his employees (D. A. 31).

The field representative for the union, Clarence Floyd, at all times following May 1, 1955, knew that Lowry was not paying either union scale wages or the royalty welfare

payments as required by the signed contracts, and acquiesced therein, in compliance with their mutual understanding that the signed contracts were for show only and were never to become effective (D. A. 31).

Also, in accordance with the understanding which he had with Floyd, he sent monthly checks to the welfare fund in amounts which he felt he could afford and without regard to the tonnage of coal mined. These monthly payments were in small, even amounts. Seven of them were for $120.00 each, two of them were for $140.00 each, three of them were for $200.00 each, three of them were for $100.00 each and the remainder were for similar, even, moderate sums. The total of these payments aggregated $3,264.00, and no one could have reasonably supposed that these sums could have been based upon actual coal production (P. A. 2-5).

On February 16, 1959, this action was brought by the trustees of the welfare fund against Lowry, seeking to hold Lowry liable for welfare payments provided for in the signed contracts, and asking for recovery against him for the difference between the sums actually paid by him and the sums due according to the provisions of the signed contracts, which difference the district court found to be in the sum of $49,531.40 (D. A. 33, 34). As a defense to the suit of the trustees, Lowry pled that there was no legal delivery of the signed contracts as they were not intended to take effect as legal obligations, but, on the contrary, it was agreed between the parties thereto that these written instruments would never become effective, and, pursuant to such agreement, the terms of such instruments were never put in force and were disregarded by the parties (D. A. 6).

After taking and filing Lowry's deposition in discovery, and after certain interrogatories were served and

answered, the trustees moved the district court to enter summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, in their favor in the amount of $49,531.40, "on the ground that the pleadings, interrogatories and depositions filed in this action and the affidavits and exhibits attached hereto show that there is no genuine issue as to any material fact, and that the plaintiffs are entitled to judgment as a matter of law" (D. A. 28). The affidavit of F. Arnold Lowry, setting out the facts as hereinabove related, was filed in opposition to this motion for summary judgment (D. A. 29-32).

The district court sustained the motion for summary judgment, stating as follows: "The Court (although cautious and somewhat reluctant in granting summary judgment) having examined all the facts, is of the opinion that there is no material fact upon which minds could differ or from which varying inferences could be drawn" (D. A. 37).

Upon appeal to the court of appeals, the appellate court reversed the decision of the district court and remanded the case to it for further proceedings. The appellate court was of the opinion that there were factual issues which would necessarily have to be determined before a consideration could be given to the legal issues of the case (A. 1a-6a).

The opinion of the court of appeals was handed down on September 16, 1961. The trustees, without waiting for this decision to become final, have directly petitioned to this Court for a writ of certiorari to the appellate court.

THE ARGUMENT.

The fact that the subject matter of this case pertains to collective bargaining contracts does not make it of such importance as to circumvent the requirement of finality as a prerequisite to review.

The petitioners here propose that this Court permit them to circumvent the requirement of the federal judicial system of finality as a condition of review. Rather than to await the outcome of a trial upon the facts in the district court, as directed by the court of appeals, they have come directly to this Court seeking a petition for certiorari. If certiorari is granted, and upon submission of this case the decision of the court of appeals is affirmed, this case will not be at an end. Nor will this Court have heard the last from it. What will follow will be a trial in the district court, a subsequent appeal to the court of appeals, and then again one of the parties will be petitioning this Court for a writ of certiorari.

The trustees argue that review should be permitted in this case because the subject matter of this suit is collective bargaining agreements, that this is a matter of such great importance that it cannot await the orderly procedures established for appeal in the federal judicial system.

Respondent submits that there is nothing in this case of such an exceptional nature as to require this Court to grant review at this stage of the proceedings. There is nothing more involved here than that a district court, without a trial, sustained a motion for summary judgment based upon a finding that there was no material fact to be resolved; the court of appeals disagreed with the district court and found that there were factual issues which required a determination before the legal issues could be resolved, and it reversed the decision of the district court

and remanded the case to it for a trial upon these factual issues. The petitioners say that the district court was right and that the court of appeals was wrong, and that this Court should grant certiorari without a trial on the factual issues which the court of appeals found to exist.

This is primarily a case involving the applicability of Rule 56 of the Federal Rules of Civil Procedure (28 U. S. C.); the pertinent sections of this rule are set out in the appendix to the petition for certiorari (A. 15a, 16a). It is apparent that the court of appeals correctly applied this rule in accordance with the established principle of this Court "* * * that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try" (*Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620, 627).

As to the pronouncement that it is in only very few situations, and where intermediate rulings may carry serious public consequences, that this Court will depart from the requirement of finality for federal appellate jurisdiction, this Court stated as follows in the case of *Radio Station WOW, Inc., v. Johnson*, 326 U. S. 120, 123, 124:

> "Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. See Heike v. United States, 217 U. S. 423, 54 L. ed. 821, 30 S. Ct. 539; Cobbledick v. United States, 309 U. S. 323, 84 L. ed. 783, 60 S. Ct. 540; Catlin v. United States, 324 U. S. 229, ante, 911, 65 S. Ct. 631 (decided February 26, 1945). This requirement has the support of con-

> siderations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction."

And again in the case of *Cobbledick v. United States*, 309 U. S. 323, 324-326, this Court reviewed the reasons and necessity for this condition to the right of appeal in the following manner:

> "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases. An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of

a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. Cogen v. United States, 278 U. S. 221, 73 L. ed. 275, 49 S. Ct. 118.

"In thus denying to the appellate courts the power to review rulings at nisi prius, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality—the idea underlying 'final judgments and decrees' in the Judiciary Act of 1789 and now expressed by 'final decisions' in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system."

While the trustees urge that this case is of such importance as to come within one of those very few situations where intermediate rulings may carry serious public consequences, and that, therefore, there should be a departure made in this instance from this requirement of finality, it is to be noted that the one case in their brief, which is referred to as being the lone successful effort of coal operators to "renege on their agreed-upon obligations," *Lewis v. Mears*, D. C. Pa., 189 F. Supp. 503, aff'd 3 Cir., — F. 2d — October 11, 1961, has been finally adjudicated (footnote to petition, p. 10). However, from the footnote reference to this case in the petition, it appears that on November 13, 1961, the trustees filed for rehearing in the Court of Appeals for the Third Circuit, for which reason the opinion has not yet been reported. A copy of the *Mears* opinion, written by Judge Kalodner, comprises the appendix to this brief. A reading of this opinion discloses that the same general proposition which is urged in the petition

for certiorari in the instant case was urged before the Court of Appeals for the Third Circuit in the *Mears* case, and rejected by that court, that is, that the national labor policy is such as to preclude the admissibility of any testimony concerning an oral agreement establishing that the written collective bargaining agreement sued upon had never become legally effective. The trustees certainly have reached the proper stage of proceedings in the *Mears* case to seek review in this Court, and if the subject matter of this case and the *Mears* case is of such great consequence as urged, then there is no reason why they cannot submit to the requirements of the federal judicial system and bring such matter to the attention of the Court by petition for certiorari in the *Mears* case, rather than to seek to arrest the orderly progress of this case toward a conclusion of the entire controversy.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT T. WINSTON,
Norton, Virginia,
JAMES S. GREENE, JR.,
Harlan, Kentucky,
Counsel for Respondent.

APPENDIX.

Opinion in Lewis v. Mears.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 13,502.

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE,
AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Appellants,

v.

EDWARD MEARS,
Individually and Trading as
MEARS COAL COMPANY,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 19, 1961

Before GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges.*

OPINION OF THE COURT

(Filed October 11, 1961.)

By KALODNER, *Circuit Judge.*

The plaintiffs, having suffered judgment against them below on a jury's verdict and their motions for a directed verdict and/or a new trial having been denied,[1] have brought this appeal raising these issues:

(1) Did the trial judge err in permitting parol

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[1] The Opinion of the District Court is reported at 189 F Supp. 503 (W. D. Pa. 1960)

evidence to the effect that a Wage Agreement allegedly entered into between the defendant and the United Mine Workers of America ("Union") which required the defendant to make certain payments to the plaintiffs' Welfare and Retirement Fund was never consummated because a condition precedent to its consummation never occurred; and

(2) Did the trial judge err in his refusal to hold as a matter of law that (a) the defendant had ratified the contract, and (b) the defendant was estopped from maintaining that the contract was never consummated?

The plaintiffs, citizens of states other than Pennsylvania, are Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 ("Fund"). The defendant is Edward Mears, individually and trading as Mears Coal Company, a resident of Marion Center, Indiana County, Pennsylvania. Jurisdiction exists by reason of diversity.

The Fund was created by the National Bituminous Coal Wage Agreement of 1950. The latter, as amended effective October 1, 1952, provided that each coal operator entering into it covenanted to pay into the Fund forty cents for each ton of coal produced for use or sale. This Agreement will hereinafter be referred to as the "1952 Agreement."

In December 1956 the plaintiffs brought suit against the defendant in the District Court of the Western District of Pennsylvania alleging that he had entered into the 1952 Agreement on October 31, 1952 and as a consequence was obligated to pay into the Fund forty cents on each ton of coal produced between October 1, 1952 and December 31, 1955 and that he had not discharged that obligation.

At the trial the defendant was permitted to testify, over the plaintiffs' objection, that when in October 1952

he signed the 1952 Agreement, as well as the 1950 and 1951 Agreements, he did so on the representation of Union's bargaining representative, Arthur Anderson, that the 1952 Agreement "wouldn't be a contract" until defendant "got the contract back signed and fully executed" by the Union. The defendant further testified that he had never received a copy of the 1952 Agreement signed by the Union and on this score it must be noted that the plaintiffs made no denial of that circumstance. The testimony established that the 1952 Agreement was signed by the Union subsequent to the time that the defendant signed it.

Anderson denied that he had agreed with the defendant that the 1952 Agreement would not become effective until it was signed by Union and a copy returned to defendant. He also testified that the defendant had signed the 1950 and 1951 Agreements on May 15, 1952, and not in October 1952 as defendant claimed.

The trial judge, pursuant to Rule 49(a), Fed. R. Civ. P., 28 U. S. C. A., submitted to the jury in the first two Interrogatories the specific issue as to whether Anderson had agreed with the defendant that the 1952 Agreement "would not become valid and enforceable" until the defendant had received a copy of it executed by the the officers of the Union.[2] The jury answered "Yes" to this Interrogatory.

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[2] The first Interrogatory read as follows:

"Did Arthur Anderson agree with the defendant Mears that the written instruments, Exhibits 1, 2 and 3, at the time they were signed by Mears, would not become valid and enforceable contracts until Mears received copies thereof executed by the officers of the United Mine Workers of America?"

The record makes clear that Exhibit 1 was the 1950, Exhibit 2 was the 1951 Agreement and Exhibit 3 was the 1952 Agreement.

(Continued on following page)

The second Interrogatory presented to the jury the issue as to whether the defendant had in writing advised the plaintiffs in April 1953 that he had cancelled the contract with the Union. The jury's answer to this Interrogatory was "No."

The issues submitted to the jury were limited to those presented in the two Interrogatories and the record discloses, as the trial judge noted in his Opinion, 189 F. Supp. 505, neither counsel requested "that any other issue of fact be submitted to the jury."

It must be noted, however, that the trial judge in his charge to the jury directed attention, as bearing upon the issue whether a binding contract had been entered into, to testimony adduced by the plaintiffs that the defendant had signed the 1950 and 1951 Agreements on May 15, 1952 and not in October 1952 when defendant said he had signed these Agreements along with the 1952 Agreement; that one Blizzard, an employee of the Fund, had on May 20, 1952 sent forms to the defendant relating to the tonnage payments and that the defendant had completed these forms and made payment in accordance therewith during the intervening months up to April 5, 1953;[3] and that the ledger records of the Fund evidenced royalty payments by the defendant as early as July 9, 1952.

(Continued from preceding page)

It affords, however, no explanation as to why the 1950 and 1951 Agreements were included in the Interrogatory since the action here was premised on the 1952 Agreement. The District Court's Opinion throws no light on the inclusion of the two earlier Agreements. It stated, however, 189 F. Supp. 505, that "the interrogatories were submitted to counsel prior to their closing address to the jury, and neither counsel made any objection thereto. * * *"

[3] It was stipulated by the parties prior to the trial that the defendant had paid royalties on tonnage produced between September 1, 1952 and February 28, 1953, during October 1952 to March 1953, inclusive.

Anent the foregoing the trial judge in his charge also called attention to the defendant's testimony that "although he had been paying royalties for a period prior to October, 1952, he did so not because he signed Exhibits 1 and 2 [the 1950 and 1951 Agreements] on May 15, 1952, but because he could not sell his coal unless he paid the royalties."

With respect to all this testimony the trial judge in substance instructed the jury that it must be weighed and evaluated in connection with the issue as to whether the defendant and Anderson had agreed that the 1952 Agreement (as well as the 1950 and 1951 Agreements), was not to become valid and binding until executed by the Union and a copy delivered to the defendant. At the same time the trial judge charged the jury that it was to consider all the other evidence adduced in arriving at an answer to the two Interrogatories.

Upon return of the jury's answers to the Interrogatories the trial judge advised the parties that he would postpone entry of judgment thereon in favor of the defendants until after oral argument on plaintiffs' motion for a directed verdict made prior to the close of the trial. Later, the trial judge denied plaintiffs' motion and subsequently denied their further motions "to reopen judgment and for a directed verdict" and for a "new trial." This appeal from the denial of these motions followed.

We will first direct our attention to the issue as to whether the trial judge erred in permitting parol evidence designed to establish that the 1952 Agreement was not to become a contract until the defendant had received a copy of it signed by Union.

Plaintiffs urge that the admission of this parol evidence violated both the parol evidence rule and the national labor policy. We do not subscribe to the plaintiffs'

view. It is clear that the parol evidence rule has no application to the facts of this case. The challenged testimony was introduced to prove that the alleged contract never existed.

It is well-settled that parol evidence is admissible to prove that a contract did not exist. In *Smilow v. Dickerson*, 357 Pa. 455 (1947), the Pennsylvania Supreme Court in so holding stated (p. 462):

> "In the leading English case of *Pym v. Campbell*, 6 El. & Bl. 370, it is said: 'The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible." (citing cases.)
>
> "It was said by Justice Harlan in *Burke v. Dulaney*, 153 U. S. 228 [1894]: 'The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract . . .,' and parol evidence was admissible to show that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations."

As to the plaintiffs' contention that apart from the parol evidence rule national labor policy precluded the admission of the defendant's testimony concerning his oral agreement with Anderson it need only be said that while it is true that the Supreme Court has held that the federal courts may "fashion a body of federal law for the enforcement of collective bargaining agreements," *Lewis v. Benedict Coal Corp.*, 361 U. S. 459, 470 (1960) and that national labor policy may require modification of the traditional rules of contract law in the case of these agreements, none of the cases cited by plaintiffs preclude the use of parol

evidence to establish that an effective acceptance was not communicated by the offeree to the offeror.

In our opinion national labor policy does not require the exclusion of parol evidence which shows the lack of an effective acceptance of an offer.

There remains for disposition the points raised by the plaintiffs that the trial judge erred in his refusal to hold as a matter of law that (1) the defendant had ratified the contract and (2) the defendant was estopped from maintaining that the contract was never consummated.

On the score of the foregoing it need only be said that the trial judge made factual findings, in accordance with the jury's answers to the Interrogatories,[4] that the elements necessary to support conclusions of law that ratification and estoppel existed were not established by the evidence. We cannot say that these factual findings were clearly erroneous. It would serve no useful purpose to dwell further on these points in view of their extensive discussion by the trial judge in his opinion.

For the reasons stated the judgment of the District Court in favor of the defendant will be affirmed.

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[4] Rule 49 (a), Fed. R. Civ. P., 28 U. S. C. A.